(2) 83-1955

No. _____

Office - Supreme Court, U.S.
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CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

Donald J. Harman,

Plaintiff-Appellant,

vs.

La Crosse Tribune, Robert D. Johns, Daniel T. Flaherty, Terry C. Gillette, Alan C. Cole, Robert D. Johns, Jr., Galen W. Pittman, Robert S. Gallagher, Gerard O'Flaherty, and Kenneth O. Blanchard,

Defendants-Respondents.

ON APPEAL FROM THE SUPREME COURT OF WISCONSIN

Jurisdictional Statement-State Civil Case

Appellant's Appendix

DONALD J. HARMAN, LTD.

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Office of the Clerk
SUPREME COURT
STATE OF WISCONSIN

Madison, March 5, 1984

TO: Helen Zoellner Kelly
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Hon. Kent C. Houck
Richland County
Courthouse
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53581

The Court today announced an order in your case as follows:

No. 82-2279
Donald J. Harman v. La Crosse Tribune, et al.

The court having considered the plaintiff-appellant-petitioner Harman's petition for review of an adverse decision of the court of appeals, district IV, dated January 18, 1984,

IT IS ORDERED the petition for review is denied, with $50 costs.

Marilyn L. Graves
Clerk of Supreme Court

No. 82-2279
STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT IV

DONALD J. HARMAN,

Plaintiff-Appellant,

v.

LA CROSSE TRIBUNE, ROBERT D. JOHNS, DANIEL T. FLAHERTY, TERRY C. GILLETTE, ALAN C. COLE, ROBERT D. JOHNS, JR., GLEN W. PITTMAN, ROBERT D. GALLAGHER, GERARD O'FLAHERTY AND KENNETH O. BLANCHARD,

Defendants-Respondents.

APPEAL from a judgment of the circuit court for La Crosse County: KENT C. HOUCK, Judge. Affirmed.

Before Gartzke, P.J., Dykman, J. and Gordon Myse, Reserve Judge.

DYKMAN, J. Harman was a shareholder and employee of the firm of Johns, Flaherty, Harman and Gillette, S.C. On March 25, 1975, the members of Harman's law firm voted to terminate his employment with them. Harman brought an action against the members and the

La Crosse Tribune, its editor, and its publisher, claiming the Tribune had wrongfully interfered with his employment. He also claimed the discharge violated his rights to free speech and to petition the government for a redress of grievances. The trial court granted summary judgment for defendants. We affirm.

Harman was also a member of the La Crosse County Board of Supervisors. The Tribune was a client of Johns, Flaherty and had been so for many years.

During the summer of 1974, the Tribune published a series of articles which criticized the county highway commissioner and members of the county highway department. An article published July 17, 1974 stated that $3,600 worth of gravel purchased for use on a county highway project had not been used there. A companion article implied that the county highway commissioner had misappropriated the missing gravel and had used it to

build his own private road. The Tribune consulted with a senior partner of Johns, Flaherty before it published these articles.

The articles' allegations were based on a report by an engineering firm that had taken drill corings from the road. The report contained a disclaimer, however, which stated that the firm did not warrant conditions below the depth of the borings or that the strata logged were typical of the entire site. After reading the report and disclaimer, Harman concluded that the report could not be used to determine how much gravel had been used on the highway project and that it therefore did not support the Tribune's allegations.

On March 24, 1975, Harman issued a press release stating that the Tribune's editor and two reporters had deliberately furnished false information to a newspaper for publication. The press release stated that the editor and reporters had violated sec. 942.03, Stats.

(1973), and urged that they be prosecuted.[1] On March 25, the other shareholders of Johns, Flaherty voted to discharge Harman. Additional facts will be stated in the opinion.

Section 802.08(2), Stats., provides that summary judgment "shall be rendered if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." When reviewing a trial court's grant of summary judgment, we apply the same analysis as the trial court. Heinz Plastic Mold v. Continental Tool, 114 Wis.2d 54, 57, 337 N.W.2d 189, 191 (Ct.App. 1983). The analysis is as follows:

> [T]he court . . . first examines the pleadings to determine whether claims

> have been stated and a material factual issue is presented. If the complaint . . . states a claim and the pleadings show the existence of factual issues, the court examines the moving party's affidavits for evidentiary facts admissible in evidence or other proof to determine whether that party has made a prime facie case for summary judgment. To make a prima facie case for summary judgment, a moving defendant must show a defense which would defeat the claim. If the moving party has made a prima facie case for summary judgment, the court examines the affidavits submitted by the opposing party for evidentiary facts and other proof to determine whether a genuine issue exists as to any material fact, or reasonable conflicting inferences may be drawn from the undisputed facts, and therefore a trial is necessary.

In re Cherokee Park Plat, 113 Wis.2d 112, 116, 334 N.W.2d 580, 582-83 (Ct.App. 1983).

FIRST AMENDMENT CLAIM

The first amendment to the United States Constition places limits on the actions of governmental bodies.[2] It provides no protection against action by private individuals. Hudgens v. NLRB, 424 U.S. 507, 513 (1976). In Brockmeyer v. Dun & Bradstreet, 113 Wis.2d 561, 573, 335 N.W.2d

834, 840 (1983), however, the supreme court held that an employee may bring a claim for wrongful discharge against a private employer when the discharge was contrary to a "fundamental and well-defined public policy" as expressed by constitutional and statutory provisions.

The claim outlined in Brockmeyer is very narrow.[3] The court said: "A wrongful discharge is actionable when the termination clearly contravenes the public welfare and gravely violates paramount requirements of public interest . . . An employee cannot be fired for refusing to violate the constitution or a statute. Employers will be held liable for those terminations that effectuate an unlawful end." Id. Assuming without holding that this rule also covers an employee who is terminated for exercising a right protected by constitution or statute, as well as an employee who is terminated for refusing to violate a constitution or statute, we conclude that Harman's discharge did not violate public

policy.

The Code of Professional Responsibility, SCR 20.01 to 20.51, restricts attorneys' right of free speech when the speech would adversely affect their clients.[4] SCR 20.35(1), a disciplinary rule, provides in part: "A lawyer may not intentionally: . . . (c) Prejudice or damage the client during the course of the professional relationship, except as required under SCR 20.36(2)." The title to SCR 20.34, also part of the rules,[5] states: "A lawyer should represent a client zealously within the bounds of the law." SCR 20.34(2), an ethical consideraiton, provides in part:

> (f) In the exercise of his or her professional judgment on those decisions which are for his or her determination in the handling of a legal matter, a lawyer should always act in a manner consistent with the best interests of his or her client...
>
> ...
>
> (n)...[A] lawyer must act always with circumspection in order that his or her conduct will not adversely affect the rights of a client in a matter he or she is then handling...

These rules and ethical considerations establish that an attorney has a duty of loyalty to his or her client--i.e., a duty to act in the client's best interests during the course of the representation. Breach of this duty constitutes professional misconduct, SCR 20.04, and may result in discipline.

The duty of loyalty runs from each attorney employed by a law firm to every client which employs that firm. Harman breached his duty of loyalty to the Tribune when he publicly accused its editor and two reporters of criminal behavior in a matter on which the firm had advised the Tribune, and called for their prosecution. His discharge under this circumstance does not "clearly contravene the public welfare" or "gravely violate paramount requirements of public interest." Brockmeyer, 113 Wis.2d at 573, 335 N.W.2d at 840. The supreme court has determined, in adopting the Code of

Professional Responsibility, that the public interest will be served if attorneys maintain a high standard of loyalty toward their clients.

Harman argues that where one party's business interests collide with another party's first amendment rights, the first amendment rights must prevail. The affidavits submitted by the law firm show, however, that the members were not merely protecting the firm against the loss of a client. They were also attempting to ensure that the firm would continue to meet its professional obligations to its client by discharging the member who had caused the firm to breach its duty of loyalty to that client. The trial court's grant of summary judgment on the first amendment claim is affirmed.

INTERFERENCE WITH EMPLOYMENT RELATIONSHIP

Law Firm Members

One who, without a privilege to do so,

induces a third person not to perform a contract with another is liable for the harm caused thereby. Liebe v. City Finance Company, 98 Wis.2d 10, 15-16, 295 N.W.2d 16, 19 (Ct.App. 1980). A claim exists for unlawful intereference with a contract terminable at will. Charolais Breeding Ranches v. FPC Securities, 90 Wis.2d 97, 104, 279 N.W.2d 493, 496 (Ct.App. 1979). Directors of a corporation who authorize a breach of contract between the corporation and a third person are protected by only a conditional privilege, which will be destroyed by a wrongful motive. Lorenz v. Dreske, 62 Wis.2d 273, 287, 214 N.W.2d 753, 760 (1974). If they are acting in good faith for the protection of the interests of their corporation and in the course of their official duty, they will sustain no liability for the breach. Id.

The members of the law firm state in their affidavits that they voted to terminate Harman's employment because Harman had placed

the firm in a position of conflict of interest with the Tribune and because they wanted to maintain the integrity of the law firm's reputation for effective representation of clients. This constitutes action in good faith for the protection of the interests of the corporation. It therefore falls within the privilege described in Lorenz and establishes a prima facie case for summary judgment -- i.e., a defense which would defeat Harman's claim.

We next examine Harman's affidavits to determine whether he has raised a genuine issue of material fact or whether reasonable conflicting inferences can be drawn from the undisputed facts. Cherokee Park Plat, supra. Specifically, we must determine whether the material Harman presents raises a reasonable inference that the firm members did not act in good faith to protect the interests of their corporation when they voted to discharge Harman.

Harman argues that the undisputed facts give rise to reasonable inferences that (1) the firm discharged him to protect themselves and the Tribune from possible civil or criminal action; (2) the firm members were acting in bad faith when they discharged him; and (3) they discharged him in retaliation for exposing the falsity of the Tribune's stories. He draws these inferences from the following facts: (1) Harman brought to the public's attention the false information contained in the Tribune's articles; (2) the firm produced no evidence that the July 17 story was accurate; (3) the firm discharged him almost immediately after he issued the press release; and (4) he consulted with several firm members before he issued the release, but none of them told him not to do it and none advised him that a conflict of interest would arise.

The facts Harman relies upon do not reasonably support the inferences he draws.

With respect to the first inference, Harman does not explain how discharging him would discourage third parties from bringing criminal or civil charges against the Tribune or a member of the firm. With respect to the second inference, bad faith is not established by the members' failure to advise Harman or by the immediacy of the discharge. Harman was responsible for his own compliance with ethical standards. Speedy termination following a breach of those standards was a proper response and does not establish bad faith. With respect to the third inference, Harman does not explain what interest the members of the law firm might have in whether the Tribunes' stories were shown to be inaccurate.

Resolving the question whether the members acted in good faith in voting to discharge Harman requires a determination of the intent behind their votes. As a general

rule, a person's intent cannot be determined on a motion for summary judgment. Lecus v. American Mut. Ins. Co. of Boston, 81 Wis.2d 183, 190, 260 N.W.2d 241, 244 (1977). In this case, however, Harman has presented no factual material from which a reasonable jury could infer that the members lacked good faith. Harman has not established that there exists a genuine issue as to any material fact. Sec. 802.08(2), Stats. The total court's grant of summary judgment for the members of the law firm on the interference claim is affirmed.

Tribune

Harman argues that the undisputed facts give rise to an inference that Gallagher, the Tribune's editor, and Blanchard, the publisher, induced the firm to discharge him. He draws this inference from the following facts: (1) Harman publicly challenged the

Tribune's credibility; (2) Gallagher asked Flaherty if Flaherty could represent him if he were prosecuted; (3) Flaherty's notes of the events of March 23 and 24 indicated it would be "very embarrassing and damaging to firm" if Harman issued the press release and refer to the release as "[Gallagher's] problem and ours;" (4) Flaherty's notes state he planned to "try to resolve the problem this noon" and telephone Gallagher afterward; (5) Flaherty and Gillette went to the Tribune to apologize to Blanchard and Gallagher; (6) when Harman told Gillette that Gallagher denied any involvement in his discharge, Gillette said, "It was Blanchard;" (7) Gallagher told Harman that the Tribune would "have to get a new law firm;" (8) Gallagher told a Tribune reporter that Harman created a conflict of interest between the Tribune and the law firm; (9) the Tribune did not report that the law firm members gave Harman permission to serve on

the county board of supervisors.

Gillette's statement, "It was Blanchard," and Gallagher's statement that the Tribune would have to get a new law firm raise an inference that Blanchard and Gallagher told the firm that the Tribune would fire the law firm if the law firm did not fire Harman. This constitutes interference with Harman's relationship with his law firm.

We conclude, however, that any such interference was not wrongful. Harman breached his duty of loyalty to the Tribune. He testified at his deposition that he would have been willing to be the complainant if criminal charges were brought against Gallagher or the reporters he had accused. This would have severely limited, if not precluded, the law firm's ability to defend Gallagher and the repoters as long as Harman remained a member of the firm. SCR 20.23 and 20.24.[6] It was not improper under these

circumstances for Gallagher or Blanchard to tell Johns, Flaherty that the Tribune would retain new counsel if Harman remained part of the firm. The trial court's grant of summary judgment for Gallagher, Blanchard and the Tribune is affirmed.

By the Court. -- Judgment affirmed.

Inclusion in the official reports is recommended.

[Decision filed January 18, 1984.]

APPENDIX

[1]Section 942.03, Stats. (1973), provides:

Whoever, with intent that it be published and that it injure any person, and with knowledge that it is false, communicates to a newspaper, magazine, or other publication any false statement concerning any person or any false and unauthorized advertisement may be fined not more than $200 or imprisoned not more than 6 months or both.

[2]The first amendment to the United States Constitution provides in part:

Congress shall make no law . . . abridging the freedom of speech . . .

[3]The narrowness of the public policy exception ot the at will rule adopted by many courts is discussed and criticized in Note, Protecting Employees At Will Against Wrongful Discharge: The Public Policy Exception, 96 Harvard L. Rev. 1931 (1983).

[4]Harman does not argue that the limitations placed on his free speech rights by the Code of Professional Responsibility are invalid under the first and fourteenth amendments to the United States Constitution. We therefore do not address that issue.

[5]SCR 20.51 provides in part:

(2) The titles to SCR 20.02, 20.06, 20.17, 20.21, 20.23, 20.31, 20.34, 20.45 and 20.48 are part of the rules.

(3) The following rules are, and may be cited as, disciplinary rules: SCR 20.01, 20.03 to 20.05, 20.07 to 20.16, 20.18 to 20.20, 20.22, 20.24 to 20.30, 20.32, 20.33, 20.35 to 20.44, 20.46, 20.47, 20.49 and 20.50.

[6]SCR 20.24(1), a disciplinary rule, provides:

Except with the consent of the client after full disclosure, a lawyer may not accept employment if the exercise of his or her professional judgment on behalf of the client will be or reasonably may be affected by his or her own financial, business, property or personal interests.

SCR 20.23, an ethical consideration, provides in part:

A lawyer should exercise independent professional judgment on behalf of a client. (1) The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of the client and free of compromising influences and loyalties. Neither his or her personal interests, the interests of other clients, nor the desires of 3rd parties should be permitted to dilute a lawyer's loyalty to a client.

(2)(a) A lawyer should not accept proffered employment if his or her personal interests or desires will, or there is a reasonable probability that they will, affect adversely the advice to be given or services rendered the prospective client. After accepting employment, a lawyer carefully should refrain from acquiring a property right or assuming a position that would tend to make his or her judgment less protective of the interests of a client.

STATE OF WISCONSIN	CIRCUIT COURT	LA CROSSE COUNTY

DONALD J. HARMON,

Plaintiff,

vs.

LA CROSSE TRIBUNE,
ROBERT D. JOHNS,
DANIEL T. FLAHERTY,
TERRY C. GILLETTE,
ALAN C. COLE,
ROBERT D. JOHNS, JR.,
GALEN W. PITTMEN,
GERARD O'FLAHERTY,
and KENNETH O'BLANCHARD,

Defendants.

MEMORANDUM DECISION

Case No. 81-CV-267

The plaintiff in this case was stockholder and member of a law firm known as Johns, Flaherty, Harman, and Gillette, S.C., located at La Crosse, Wisconsin. The plaintiff was also a member of the La Crosse County Board, having served on the board for a number of years before the incidents involved here occured. The plaintiff's membership in the county board was known to the other members of the law firm.

The defendant La Crosse Tribune, Inc. had

been a client of Johns, Flaherty, Harmon and Gillette, S.C. for a number of years before the incident.

In the summer of 1974 the La Crosse Tribune began a series of articles about possible fraud in the La Crosse County Highway Department.

Over a period of time the plaintiff, Donald Harmon, became convinced that the articles in the La Crosse Tribune were unfair and were based on false information. In late March of 1975 the plaintiff decided that Robert D. Gallagher and Kenneth O. Blanchard were guilty of deliberately publishing false information about the La Crosse County Highway Commissioner and the Highway Department. The plaintiff felt that he was obliged to accuse the two defendants, Gallagher and Blanchard, along with other employees of the La Crosse Tribune, of deliberately furnishing false information for publication.

The plaintiff talked to a number of the associates at the law firm before he released the accusation to the news media. The plaintiff was told that the law firm had advised the Tribune about the legalities of publishing the stories about the Highway Department. Daniel T. Flaherty, a member of the firm and one of the defendants, told the plaintiff that if he were the plaintiff he would not publish the charges. Other members of the firm, who the plaintiff talked to about the matter, were noncommittal.

The plaintiff published the charges and on March 25, 1975, which was the day following the publichation of the charges, the plaintif's status as a member of the law firm was terminated by a unanimous vote of the members of the firm. This law suit resulted from that termination.

The plaintiffs first cause of action asks for damages due to tortious interference with

his employment on the part of the named defendants.

The defendants fall into two general categories as they relate to this cause of action. First, there are those defendants, who were employees of the La Crosse Tribune and allegedly forced Johns, Flaherty, Harmon, and Gillette to fire the plaintiff. Secondly, there are the defendants, who were other members of the law firm, who voted to fire the plaintiff.

As to the first category of defendants, the affidavits and depositions show that the defendant Gallagher told the defendant Flaherty that the La Crosse Tribune might have to retain a different law firm. No mention was made as to whether this change was to be permanent or only for the duration of the dispute with the plaintiff. Nowhere in the materials submitted in connection with the motion for summary judgment is there any showing that anyone on the Tribune asked to

have the plaintiff fired.

The plaintiff asks the court to make inferences that there must have been a request by the Tribune to terminate his employment. The court is of the opinion that such an inference would be speculative and amount only to a guess. A finding of fact cannot be based on speculation or a guess based on a possibility.

Therefore as to the defendants La Crosse Tribune, Kenneth O. Blanchard, and Robert D. Gallagher the facts in the case are not in dispute and there are not sufficient facts to support a cause of action for tortious interference with a contract of employment by the Tribune or its employees.

The second category of defendants have a much closer involvement in the plaintiffs' discharge. The facts surrounding the incident which caused the discharge are not in dispute. The plaintiff decided to make the charges

public after he had knowledge of the fact that another member of the firm, Robert D. Johns, had given advice to the La Crosse Tribune concerning the publication of the stories about the highway department. It is also an undisputed fact that the defendant Robert Johns knew that the plaintiff was a member of the County Board before advising the La Crosse Tribune concerning the stories about the La Crosse County Highway Department.

The reason given for the action taken in terminating the plaintiff was that he had intentionally acted in a manner that created a conflict of interest for the firm and jeopardized the retention of the La Crosse Tribune as a client. This reason is supported by the materials submitted by both sides on the motion for summary judgment.

The plaintiff has also submitted a large quantity of material which indicates that the Tribune stories were false, or at least based

on inadequate and inconclusive facts.

Whether or not the plaintiff's discharge was actionable depends on what the motives of the defendants were when they voted to fire the plaintiff. The standard used by the Wisconsin Supreme Court is one of good faith protection of the interests of the corporation. Thus if the directors are to be held liable to the defendant there must be facts upon which a finding of bad faith could be made by the trier of fact. (Lorenz vs. Dreske, 62 W2nd 273)

The undisputed facts are that the plaintiff's action did cause a conflict of interest between the law firm and its client the La Crosse Tribune. This conflict threatened to cause the loss of a client either temporarily or permanently. It is also clear that the plaintiff knew that his action would cause this problem. There are no facts presented by any party that indicate any other

motive for the dismissal than to avoid the loss of the Tribune as a client.

It is the court's opinion that there are not facts upon which to base a finding of bad faith on the part of the defendant members of the law firm. The firing of an employee who has intentionally alienated a customer is clearly the type of action that is within the area of good faith business practice.

The plaintiff has raised the proposition that Robert Johns, Sr. should not have advised the La Crosse Tribune about the stories since he knew that the plaintiff was a county board member. In the court's opinion this theory is not logical. Mr. Harmon's charges against the newspaper were not brought because of any duty he assumed by being on the county board. What the plaintiff did he did as a citizen and not because he was compelled to make the charges by virtue of being a member of the county board. The element of foreseeability of harm

is totally lacking in any tort alleged against Robert Johns, Sr. based upon the advice he gave the La Crosse Tribune.

Although there are facts that show some anger on the part of Mr. Flaherty immediately before the discharge, the point of the defendant Flaherty's actions was to dissuade the plaintiff from making the accusations against the Tribune. Nowhere in the materials submitted are there facts to support some other motive for the firing.

Therefore the court grants summary judgment to the defendant members of the law firm as to the plaintiff's first cause of action.

The plaintiff's second cause of action seeks damages for the violation of his constitutional rights under the first and fourteenth amendments to the U.S. Constitution and under article I sections three and four of the Wisconsin Constitution.

The actions alleged as the basis for the violation of the plaintiff's rights are the same as those alleged as the basis for the first cause of action.

There is no factual dispute that the plaintiff did exercise his right of free speech and did suffer a penalty for it. There is also no factual dispute that the restraints on the plaintiff's liberty were imposed by private individuals and not by any direct governmental action.

The defendants argue, correctly, that the constitutional protections asserted by the plaintiff are protections against state action and not against the actions of individuals. In order to grant the relief requested by the plaintiff, some state action would have to be found as a fact.

The only possible state action would be as a result of the states' imposition of ethical standards on the plaintiff and the

members of the law firm to disqualify itself from representing a client in a matter in which another member of the firm was an adverse party. A person who practices law agrees to some limitations on his freedom of speech in return for the privilege of practicing law. As an example an attorney may not reveal confidential communication he has with a client. In this case the plaintiff by speaking out created a conflict of interest which caused an ethical problem that was the reason for his discharge. It is the court's opinion that the states' interest in promulgating rules for the conduct of attorneys is of sufficient importance to justify the infringement of the plaintiff's rights under the constitution. The plaintiff, by being admitted to the bar, voluntarily submits to the rules regulating attorneys.

The plaintiff has cited the recent case of NAACP vs. Claiborne Hardware Co. 73 LE ed 2d 1215 (1982) as authority for his cause of

action. This case does not appear to hold that a civil action for damages resulting from the exercise of free speech does constitute sufficient state action to allow invocation of constitutional protections.

This court is still of the opinion, as stated above, that the regulation of the conduct of attorneys is of sufficient concern to justify state action which restricts the right of free speech.

In a final word about the constitutional question, the court is of the opinion that the constitution does not protect a person from all the possible adverse consequences flowing from the exercise of free speech. In this fact situation Mr. Harmon may have been right and his opponents wrong. Mr. Harmon has suffered the consequences of speaking out against powerful opponents, some of whom regularly assume the role of guardians of the first amendment. Contrary to popular

belief the constitution does not always prevent injustice, nor does it make opponents equal, it only tries to keep the fight fair.

In this case the fight was fair and there was no unconstitutional interference.

The court grants summary judgment to the defendants on all of the plaintiff's causes of action. The attorneys for the defendants are to prepare appropriate judgments dismissing the plaintiff's complaint.

No decision is made as to any contractual rights the plaintiff may have against the law firm in regard to his discharge. These matters were not a subject of this law suit.

Dated this 6th day of October, 1982.

BY THE COURT:

Kenneth C. Houck
CIRCUIT JUDGE

IN THE SUPREME COURT OF THE STATE OF WISCONSIN

Donald J. Harman,

Plaintiff-Appellant,

vs.

No. 82-2279

La Crosse Tribune, Robert D. Johns, Daniel T. Flaherty, Terry C. Gillette, Alan C. Cole, Robert D. Johns, Jr., Galen W. Pittman, Robert S. Gallagher, Gerard O'Flaherty, and Kenneth O. Blanchard,

Defendants-Respondents

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Donald J. Harman, the appellant above named, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of the State of Wisconsin affirming the Motion for Summary Judgment granted in favor of respondents, above named, and against appellant, entered on March 5, 1984.

BEST AVAILABLE COPY

This appeal is taken pursuant to 28 U.S.C. §1257(2).

Dated this 25th day of May, 1984.

DONALD J. HARMAN, LTD.

BY: _____
Donald J. Harman
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AFFIDAVIT OF SERVICE

STATE OF WISCONSIN)
) SS
LA CROSSE COUNTY)

The undersigned being first duly sworn says that a true copy of this document was served upon the hereinafter named attorneys by enclosing the same in an envelope postpaid for first class handling which bore the sender's name and return address and which was addressed to each such attorney at his respective post office address and which was deposited in a U S Post Office depository in La Crosse, Wisconsin on the 25th day of May, 1984.

Melissa Uelk Smith
P.O. Box 1807
Madison, WI 53701

Richard Delacenserie
P.O. Box 927
Madison, WI 53701

_____

Subscribed and sworn to before me this 25th day of May, 1984.

_____
Notary Public, State of Wisconsin
My Commission is permanent

STATE OF WISCONSIN	CIRCUIT COURT BRANCH I	LA CROSSE COUNTY

Donald J. Harman,

Plaintiff,

vs.

AMENDED COMPLAINT

La Crosse Tribune,
Robert D. Johns,
Daniel T. Flaherty,
Terry C. Gillette,
Alan C. Cole,
Robert D. Johns, Jr.,
Galen W. Pittman,
Gerard O'Flaherty,
Kenneth O. Blanchard,
and Robert S. Gallagher,

Case No. 81-CV-267

Defendants-Respondents

Donald J. Harman, pro se, for a cause of action against the above named Defendants alleges:

First Cause of Action

1. Plaintiff is a resident of the City and County of La Crosse and prior to March 25, 1975 was employed by Johns, Flaherty, Harman and Gillette, S.C., a Wisconsin service corporation, as an attorney duly licensed to practice law in the State of Wisconsin rendering legal services to the general

public.

2. That in addition to such employment, Plaintiff was also a duly elected supervisor to the La Crosse County Board, having been elected supervisor continuously since April of 1966 from the voting district in which he resided in the City of La Crosse.

3. That Defendant, La Crosse Tribune, upon information and belief is a Wisconsin corporation duly organized and existing by virtue of the laws of the State of Wisconsin, and publishes a newspaper in La Crosse and surrounding area. That the Defendants, Robert D. Johns, Daniel T. Flaherty, Terry C. Gillette, Alan C. Cole, Robert D. Johns, Jr., Galen W. Pittman, and Gerard O'Flaherty are adults, and were on March 25, 1975, residents of La Crosse County, Wisconsin except Gerard O'Flaherty who resided in La Crescent, Minnesota, that all of said Defendants are attorneys duly licensed to practice law in the

State of Wisconsin and were directors and/or officers of Johns, Flaherty, Harman and Gillette, S.C., a Wisconsin corporation; that the Defendant, Kenneth O. Blanchard and Robert D. Gallager, were, on March 25, 1975, employees of the La Crosse Tribune, namely, their publisher and editor respectively, and Kenneth O. Blanchard was then and is now an adult resident of La Crosse County, Wisconsin; and Robert D. Gallagher is now an adult resident of Brown County, Wisconsin and is employed by a Green Bay newspaper, namely, The Green Bay Press Gazette.

4. That sometime prior to March 25, 1975, and in fact in July of 1974, the Defendant, La Crosse Tribune published a series of stories in its daily newspaper regarding the La Crosse County Highway Department and its Commissioner, Orville "Red" Smith to the effect that they were involved in irregularities in the management of that

Department.

5. That unbeknownst to the Plaintiff, and in conflict of interest with their obligation to the Plaintiff, the Defendants, Robert D. Johns accepted employment from the Defendant, La Crosse Tribune on or about June 29, 1974, to help prepare or give legal assistance or advice to the Defendant, La Crosse Tribune regarding the story involving the alleged irregularities of the La Crosse County Highway Department and Orville "Red" Smith. At the same time said Defendants accepted such employment, Plaintiff was a duly elected member of the La Crosse County Board and voted upon and participated in discussions about said matters in Plaintiff's capacity as a County Board Superviors. That as the time of the publication of said stories by La Crosse Tribune in the summer of 1974, Plaintiff also discussed the contents thereof with the Defendants, Robert D. Johns and

Daniel T. Flaherty and said Defendants faled to advise the Plaintiff of the fact that defendant, Robert D. Johns had worked on or participated in any way in the preparation or the giving of assistance or advise concerning the stories published by the Defendant, La Crosse Tribune about the La Crosse County Highway Department and Orville "Red" Smith in July of 1974.

6. That Plaintiff as an attorney and as a member of the La Crosse County Board knew that the stories published in the Defendant, La Crosse Tribune contained fa[illegible] information which was held out by the Defendant, La Crosse Tribune to the public as being true. That likewise, said Defendant, Robert D. Johns either knew or should have known that said stories contained false information.

7. That as a result of the story and the Plaintiff's knowledge of the falsity of the information therein contained, Plaintiff

accused three persons who furnished information to the defendant, La Crosse Tribune of violating §942.03 of the Wisconsin Statutes which made is a misdemeanor to knowingly furnish false information to a newspaper. (See Exhibit "A" attached hereto).

8. That prior to Plaintiff's accusation being made public, because the Defendant, La Crosse Tribune was a client of Johns, Flaherty, Harman & Gillette, S.C., and without knowledge of the Defendant's, Robert D. Johns, involvement in the story as set forth in paragraph 6, Plaintiff sought approval of the Defendants, Alan C. Cole, Galen Pittman, Terry C. Gillette and Robert D. Johns, Jr., as to plaintiff's contemplated public disclosure of the contents of Exhibit "A"; that Plaintiff did not contact the Defendant, Robert D. Johns, Sr., since he was on winter vacation, and Plaintiff did not discuss the matter with Defendant, Gerard O'Flaherty prior to the

accusation being made public; that Defendant, Daniel T. Flaherty upon discovering the Plaintiff's intent to disclose the contents of Exhibit "A" to the public, for the first time told the Plaintiff on March 24th, 1975, that Defendant, Robert D. Johns, Sr., "worked on that story" referring Exhibit "A", prior to its publication in July of 1974; that the Defendant, Daniel T. Flaherty advised Plaintiff that Defendant, Daniel T. Flaherty would not make public the contents of Exhibit "A" if the Defendant Daniel T. Flaherty were the Plaintiff, and further, the Defendant, Daniel T. Flaherty advised Plaintiff that if Exhibit "A" must be released to the public, then the Plaintiff should get someone else on the La Crosse County Board to make it public. At no time during that discussion did Defendant, Daniel T. Flaherty or did anyone of the other Defendants at any later time either alone or acting in concert with one another

issue an unequivocal order to the Plaintiff prohibiting the release of the contents of Exhibit "A" by Plaintiff to the public.

9. That Plaintiff believes that the motive of Daniel T. Flaherty in suggesting that Plaintiff suppress the release of the contents of Exhibit "A" to public was that if released, Defendant, Robert D. Johns, Sr., was exposed to same criminal charge of violating §942.03 of the Wisconsin Statutes to-wit, knowingly furnished false information to a newspaper, that Plaintiff made against those persons named in Exhibit "A".

10. Thereafter, Plaintiff released the accusation to the public on March 24, 1975.

11. That upon delivery of Exhibit "A" to Defendant, Robert D. Gallagher, said Defendant, Robert D. Gallagher said "I guess we'll (meaning the La Crosse Tribune) have to get a new law firm.

12. That thereafter, the Defendants, and

each of them acting in concert with one another procured the dismissal of the Plaintiff from Johns, Flaherty, Harman & Gillette, S.C., Plaintiff's employer stating as the grounds for such removal that the Plaintiff interfered with the attorney-client relationship of Johns, Flaherty, Harman & Gillette, S.C., and the La Crosse Tribune, whereas in truth and in fact, the Defendants' interference with the Plaintiff's employment was solely to punish the Plaintiff for publically revealing the truth about the falsity of the La Crosse Tribune's stories contained in Exhibit "A".

13. That thereafter, the La Crosse Police Department investigated the contents of the story published by the La Crosse Tribune contained in Exhibit "A" and found it contained false information. (See Exhibit "B" attached hereto).

14. That thereafter, the District Attorney for La Crosse County requested a "John Doe" investigation of the charges contained in the stories contained in Exhibit "A" and after investigation, the hearing was closed. No criminal or other charges were made against Orville "Red" Smith, the La Crosse County Highway Department, or any member of the La Crosse County Board or anyone else as a result of the John Doe investigation.

15. That immediately prior to the Defendants interference with the employment contract, Plaintiff had nonvested pension and profit sharing rights of more than $13,000.00 with his employer, Johns, Flaherty, Harman & Gillette, S.C., that as a result of the termination of his employment with Johns, Flaherty, Harman & Gillette, S.C., Plaintiff was a required by reason of the forfeiture rules governing the pension and profit sharing

plan, forfeited a $13,000.00 of his pension and profit sharing plan, which $13,000.00 was immediately redistributed amongst the Defendants, Robert D. Johns, Daniel T. Flaherty, Terry C. Gillette, Robert D. Johns, Jr., Alan C. Cole, Galen W. Pittman and Gerard O'Flaherty and other employees of Johns, Flaherty, Harman & Gillette. That since the forfeiture of the said $13,000.00, the pension and profit sharing plan has tripled the $13,000.00 to present value of approximately $40,000.00.

16. That after the interference with the employment contract of Plaintiff, and Johns, Flaherty, Harman and Gillette, S.C., by Defendants, Plaintiff suffered a loss of salary in the amount of at least $30,000.00 per year. That Plaintiff owns 500 shares in Johns, Flaherty, Harman and Gillette, S.C., that he cannot sell to anyone, save the Defendants, Robert D. Johns, Daniel T.

Flaherty, Terry C. Gillette, Alan C. Cole, Galen W. Pittman, Robert D. Johns, Jr., and Gerard O'Flaherty; that said stock was reasonably worth the sum of $20,000.00 on March 25, 1975 but in the Plaintiff's hands has no value whatever.

17. That Defendants acted with malice in interfering with the employment contract of the Plaintiff and Johns, Flaherty, Harman & Gillette, S.C., as set forth above.

Second Cause of Action

Plaintiff realleges paragraphs 1-17 as if fully set forth herein.

18. That this action arises under the United States Constitution, particularly under the provisions of the 1st and 14th amendments and under the State of Wisconsin Constitution, particularly under the provisions of Article I, §3 and 4 thereof in that the Defendants and each of them interfered with and terminated Plaintiff's employment with his employer

because the Plaintiff exercised his right to speak freely and to petition the government for a redress of grievances.

WHEREFORE, Plaintiff demands judgment against the Defendant and each of them for the sum of $228,000.00 and for punitive damages in the amount of $3,000,000.00.

/s/
Donald J. Harman, pro se

ADDRESS:

304 Hoeschler Exchange Bldg.
205 Fifth Avenue South
P.O. Box 455
La Crosse, WI 54601
(608) 782-7566

TO: Judge Roroff
D.A. Ed Nix 3/23/75

I accuse R. Gallagher, G. Blum, and Nick Pintozzi of violating sec. 942.03 of Wis. Stats. individually or as co-conspirators. This section of the Stats. makes it a misdomeanor for anyone to wilfully give false information to a newspaper with intent that it be published and that it injure any person.

The false statement made by the conspirators is that La Crosse County Highway Commissioner Orval "Red" Smith stole $3600. worth of county owned crushed rock from the Kiel Coulee Road and placed it on his own road, Verde Valley Road. There was no rock missing from the Kiel Coulee Road which is why the County John Doe proceedings were dismissed without any charges being filed against anyone.

The Twin City testing lab report was falsely used by the conspirators in the July

"EXHIBIT A"

17th article to substantiate their insinuated false statement that Red Smith stole the rock. The last paragraph of report disclaims any conclusions can be drawn from the report because of the inadequate number of test borings. The tests could not be conducted without the conspirators knowing that conclusions they were planning on drawing were false.

Therefore the conspirators willfully furnished false information to the La Crosse Tribune on or before July 17, 1974 with intent that it injure Red Smith, by insinuating he stole $3600 worth of county owned crushed rock.

I had previously asked Mr. Randolph to prosecute this matter but he declined.

Since then I have added the affidavit of Stanley W. Peterson to establish the guilty of Mr. Gallagher, Editor of the La Crosse Tribune, Mr. Blum, Mr. Pintozzi reporters of

the Tribune are guilty by virtue of having knowingly used the false information in the article they wrote published July 17, 1974.

I am asking the complaint be issued by Mr. Nix. If he refuses I ask Judge Roraff to have a probable cause hearing pursuant to 968.02 of the Wis. Stats.

/s/_____
Donald J. Harman
11th Dist. Supervisor
La Crosse County Board

Inc.
July 17th Art. and Editorial
Aff. S.W. Peterson
Twin City Testing Lab Report
Letter - former D.A. Randolph

[Note: The above enclosures have been omitted for purposes of this appendix.]

DEPARTMENT OF POLICE - LA CROSSE WISCONSIN

INTRA DEPARTMENT MEMORANDUM

Date: September 16, 1975
TO: District Attorney Ed Nix
FROM: Detective William Schmidt
SUBJECT: Investigation - La Crosse Tribune
Case 75-11891
COPIES SENT TO: Lieutenant Jim Dunham

On August 19, 1975 correspondence was received by the Chief of Police, from District Attorney Nix, requesting an investigation. The request was made relative to a complaint filed by Attorney Donald J. Harman, County Board Supervisor for La Crosse County. The complaint indicated that Robert S. Gallagher, Grant Blum, and Nick Pintozzi, as employees of the La Crosse Tribune, gave false information to the Tribune with intent that it be published and that it injured person(s) contrary to Wisconsin Statutes 942.03.

An opinion from the City Attorney OK'ing Mr. Nix's request for an investigation was received and, subsequently, an investigation began on September 15, 1975 with the intent of gaining preliminary information.

On September 15, 1975, at 10:10 a.m., contact was made with Mr. Robert S. Gallagher, Editor of the La Crosse Tribune. Mr. Gallagher was informed of the investigation, its reason, and was informed of his rights. When asked if he would answer questions relative to this inquiry, he stated he would and that if the questions were written so that he might confer with his Attorney, Mr. Dan Flaherty, relative to the answers, he would cooperate. Mr. Gallagher stated that Mr. Grant Blum, writer for the Tribune and under his supervision, was unavailable at this time. He further

"EXHIBIT B"

indicated that any questions for Grant Blum should also be written so that the Tribune Attorney might assist in answering them. Mr. Gallagher was informed that the District Attorney would be informed of the questions and answer response and would no doubt submit the appropriate questions to himself and Mr. Grant Blum at a later date.

On September 15, 1975, at 11 A.M., contact was made with Donald J. Harman, Room 304 Exchange Building, 205 So. 5th Street. Mr. Harman is an Attorney at Law, a County Supervisor, and complainant on this matter. Mr. Harman related that he had no additional information, stating that the information he had, including his ideas, information, and evidence had already been submitted to the District Attorney's office. He stated that at this time Mr. Nix has all of his available information.

On September 15, 1975, at 1:30 p.m., contact was made with the Resident Manager, Mr. Gail D. Jensen, Twin City Testing & Engineering Laboratory, 214 Cass Street. Mr. Jensen is an engineer with that firm and did the testing for the Tribune and Town of Medary, at their request on July 16, 1975. The reason for contacting Jensen was to establish that his findings were accurate and accounted for, and to establish whether information quotes printed by the Tribune in the July 17, 1974 paper were made by him. Mr. Jensen was shown the Twin City testing report in possession, signed by himself. He said the report was a copy of his original report. He was then shown a photo copy of the Tribune, July 17, 1974, displaying an article on the subject of sample boring. Jensen read the article and pointed out that the first paragraph, where an insinuation is made that La Crosse County tax payers were bilked out of $3,000 by not receiving its value in crushed rock, was not

authored by himself. Mr. Jensen also pointed out a quotation in the lower half of the third column of the same issue and related that he did not state anything about should depth or ways in which the State of Wisconsin builds its highways.

Mr. Jensen was asked about the procedure of his test boring, the test boring sample, findings of the tests, and his conclusion of the test. He relatd that the borings were made at the intervals as indicated on the result sheet. As indicated in his disclaimer of the results, Jensen verified to me that "We do not warrant conditions below the depth of our borings, or that the strata logged from our borings, are necessarily typical of the entire sight". Jensen related to me that without knowing the exact contour of the road bed, prior to its construction or preparation, it is virtually impossible to tell how much material is contained in the road bed. He said that he could only account for the borings themselves. He further said that if there was a low spot or pot hole between his borings, the constructor would have naturally had to use more material in that low spot to bring it up to the road bed. Due to this fact, an average depth could not accurately be measured without knowledge of contours of the road prior to construction and/or volume and weight of each truck load that was used in the initial road construction.

Mr. Jensen was shown an affidavit filed by the Medary Town Chairman, Stanley W. Peterson. Jensen was questioned relative to the fourth paragraph, wherein it stated that Gallagher checked three engineering firms and found 8,000 cubic yards unaccounted for, and had contracted an engineering firm which could conduct borings and could tell within 1% margin of error the number of yards used on the Kiel Coulee Road. Mr. Jensen stated he

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never said anything to that effect, nor could he imagine a firm stating that 1% margin would be possible.

In the same affidavit, paragraph 14, Jensen was queried regarding "Dirty Sand", insomuch as the Tribune article inferred it was inferior material. Jensen brought out the test borings and explained to me the testing and rating procedure and the term "Dirty Sand". He said "Dirty Sand" is sand with an appreciable amount of fines. He said fines are a binding material that passes through a #200 seive as indicated in their lab test reports. Jensen said the dirty sand is a good road construction material due to the fact that the fines binding material hold the gravel together much better than material without fines, such as river run sand, etc.

On September 15, 1975, at 3:15 p.m., contact was made with William Roarig, Highway Engineer at the State Office building. Roarig was asked what standards or specifications are set forth in the construction of a secondary road, such as the Kiel Coulee Road, referring to the Tribune article that indicated Jensen made a statement relative to the State of Wisconsin roads. Roarig stated that that the State of Wisconsin does not have specifications on secondary roads, including using or not using "Dirty Sand", a percentage of it, etc. He said specifications are not mandatory on that type of road.

Contact was made at the same location with Mr. W.J. Herried, Highway Engineer and Supervisor for the State Highway Department. Mr. Herried verified the fact that secondary roads do not have specifications as such, unless it would be called for in the contract as might be the case if insisted on by a private agency or contractor, etc. When Mr. Herried read the July 17, 1974 Tribune articles regarding road

shouldering, etc., he said that the road in question probably was constructed so that the grass could be planted next to the surface for holding purposes, etc. He said that type of construction was not unusual.

In summary, it should be noted that Mr. Jnesen denied making certain statements that appeared in the Tribune articles regarding highway shoulders, Stated constructed highways, etc. It is assumed that the article was totally wrong, or there was a misquotation on the part of it's author. It should also be pointed out that the Tribune apparently printed the results of the Twin City Testing Lab's preliminary statement issued sometime on July 16, 1974, and the finding by the Twin City Lab was not printed until August 9, 1974. It is apparent that the Tribune did not make mention of the disclaimer, as stated by the Engineering Lab report, nor did they mention that their results were received from the preliminary testing and received from Mr. Jensen orally. It should, likewise, be noted that Mr. Jensen displayed the various materials and, in lay terms, made this investigator aware of the term "Dirty Sand", indicating that it was not an inferior product. He also noted that it would be near impossible for a testing firm to arrive at a margin of error of 1% or less, having so many unknowns such as contour of a roadbed prior to construction, curvature in the road, low spots, etc.

If and when the questions are sent to the Tribune writers and answered, those answers may have a bearing on the doubts raised in this preliminary investigation.

Respectfully submitted,
/s/
William Schmidt
Detective

WS:ms